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No. 80-1576

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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PRINCETON UNIVERSITY AND STATE OF NEW JERSEY,
*Appellants,*

vs.

CHRIS SCHMID,
*Appellee.*

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**On Appeal from the Supreme Court of New Jersey**

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## BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

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## BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

### INTEREST OF THE AMICUS CURIAE

The American Association of University Professors (AAUP) was founded in 1915 to advance the standards, ideals, and welfare of teachers and research scholars in American colleges and universities. Commencing with the 1915 *General Report on Academic Freedom and Academic Tenure* (1915 *Declaration*) and culminating in the 1940 *Statement of Principles on Academic Freedom and Tenure* (1940 *Statement*), the Association's paramount concern has been the articulation of standards governing academic freedom and tenure in American higher education.

The instant case presents this Court with novel and sweeping claims to institutional autonomy and academic freedom under the First Amendment. The claims, if embraced wholesale, would go far to insulate private institutions of higher education from scrutiny by government—state or federal—virtually without regard to the compatibility of the particular constraint with the educational enterprise. As the primary proponent of the

American theory of academic freedom, the AAUP believes that it is uniquely situated to address this Court as *amicus curiae* in this case.

## QUESTION PRESENTED

Whether a private university has the right under the First, Fifth and Fourteenth Amendments to determine without state interference what expressive activities by strangers it will permit on its campus and under what circumstances.

## SUMMARY OF ARGUMENT

There is much to commend in Princeton University's general concern for institutional freedom from the arbitrary exercise of governmental power, and the value of academic freedom. *Amicus* AAUP and Princeton University agree as to the importance of academic freedom to the individual teacher. *See* Brief of Princeton University, n. 12 at 9. But the difficulty with the precise claims advanced lies in their lack of differentiation between an institution's need for autonomy when it functions as a university, *i.e.* in making educational decisions, and its interest in maintaining administrative control over the territory it occupies.

Legal protection for institutional autonomy can be grounded either on a policy of tolerance of different kinds of institutions, or on the need to protect academic freedom. On the one hand, religious (or political) groups have long had a recognized right to maintain institutions that exist to transmit established "truths." Princeton asserts that such institutions have a prerogative to measure virtually every utterance on their property against a sectarian yardstick. Princeton finds this prerogative, which it asserts under the general head of "academic freedom," to have been offended by the decision below.

This argument mistakes institutional pluralism for academic freedom. Academic freedom is a scholar's right to be free of institutional (or governmental) con-

trol in professional utterance. The dissemination only of established truths is the antithesis of academic freedom. Princeton's "academic freedom" claim cannot be accepted without doing violence to the meaning of the term.

Moreover, the decision below gives ample scope to institutional pluralism and idiosyncrasy. The New Jersey Supreme Court held that the purpose of the particular expressive activity must be measured against the private purpose to which the institution is dedicated. The court conscientiously adverted to the value of institutional autonomy in instructing how these factors are to be weighed. In the absence of an authentic case, involving an institution that *does* impose a religious or ideological test for on-campus expression, it remains to be seen whether the New Jersey Supreme Court would extend the expressive easement of the state constitution as far as Princeton suggests.

On the other hand, legal protection of institutional autonomy can derive from academic freedom in the authentic sense. Any direct governmental infringement of the freedom of teaching, learning, and investigation, is an assault upon the autonomy of institutions dedicated to academic freedom. In addition, universities perform functions, such as the selection of faculty, that are inexorably intertwined with the exercise of academic freedom. Freedom *of* the university is required at certain points in order to protect freedom *in* the university. But in no way does the decision below invade the autonomy necessary to protect academic freedom, either directly or derivatively. The decision does not limit or affect what may be taught, how it will be taught, or who will teach it.

In the most far-reaching of the arguments presented, Princeton asserts that any judicial examination of its reasons for excluding a speaker would independently invade institutional autonomy. External inquiry *can* be impermissibly intrusive depending upon the purpose of

the inquiry, the procedural safeguards afforded, and the likely impact upon academic freedom or the conduct of educational affairs. But if it is unconstitutional simply to be called upon to explain how educational goals would be offended by more liberal rules governing speaker access to the campus's public areas, how much more unconstitutional is being called upon to explain the failure to reappoint a faculty member, challenged under Title VII, or to explain the reasons for a dismissal of a faculty member challenged as a breach of the institution's contractual commitment to academic freedom and tenure. It will not do, in the latter case, to suggest that the institution need only abide by its own standards. In the latter case, as in the instant case, the infirmity lies in a judicial determination of what the standards *are* that the institution did adopt. *Amicus* AAUP believes the standards laid down below are adequately protective of a university's integrity.

## ARGUMENT

### I. IN THE AMERICAN SETTING, ACADEMIC FREEDOM AND AN INSTITUTION'S ADMINISTRATIVE AUTONOMY ARE RELATED BUT ESSENTIALLY DIFFERENT CONCEPTS

Princeton University argues to a syllogism: The major premise is that, as this Court has recognized, "academic freedom" is a subset of the freedoms encompassed by the First Amendment. The minor premise is that private institutions of higher education should, as institutions, be understood to enjoy academic freedom. The conclusion: any interference by government with an institution's academic freedom must be viewed as a violation of the First Amendment. Brief of Princeton University, Section I(A); *see* also Brief of the American Council on Education (ACE) and the National Institute of Independent Colleges and Universities as *amici curiae* at 11-12 (arguing to the state's intrusion on Princeton's academic freedom) (hereinafter Brief *amicus curiae* of ACE).

This argument confuses two closely related but essentially different concepts—an individual scholar's academic freedom and an institution's administrative autonomy. It is easy to identify one with the other, for they have a common origin in the medieval university and, in the American setting, institutional autonomy, when rightly invoked, has been thought of as a necessary, but ancillary, protection for a faculty's academic freedom.

The medieval university was a guild, a corporation. The intellectual freedom of the medieval scholar existed within the limitations of that self-governing community, sometimes in conflict with an authoritative system of faith. *See generally*, R. Hofstadter and W. Metzger, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES, Ch. I (1955) (hereinafter Hofstadter & Metzger). As Walter Metzger explains, medieval scholars

> sought *immunity* from the reach of power and a corporate *autonomy* that would empower them to assist and defend themselves. The principal immunity they sought was to be exempt from the jurisdiction of temporal (and often ecclesiastical) tribunals in criminal and civil legal actions. The key to the autonomy they sought was to gain through the device of incorporation . . . —above all—to enact the rules and regulations to which they and those who dealt with them had to conform.

Metzger, *Academic Tenure in America: A Historical Essay* in FACULTY TENURE (Commission on Academic Tenure in Higher Education) 93, 96 (1973) (emphasis in the original) (hereinafter *Academic Tenure*).

With the rise of the Nation State and the eclipse of ecclesiastical by secular authority, the continental university had to yield some of its autonomy to state control. Its inhabitants, however, continued to seek freedom of scholarship. In nineteenth century Germany the ideal of academic freedom—*Akademische Freiheit*—developed

and eventually was transplanted, with modification, to American shores. Hofstadter & Metzger, *supra* Ch. VIII ("The German Influence"). *See, also,* J. Brubacher and W. Rudy, HIGHER EDUCATION IN TRANSITION—A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES 1636-1976, Ch. 15 (3d ed. 1976). The German concept referred to *Lerhfreiheit* (the freedom of the professor to teach, inquire, and publish) and *Lernfreiheit* (the freedom of the student in the learning process). Significantly, the administrative context in which this "academic freedom" was exercised continued to embody a considerable residue of the medieval heritage of corporate autonomy.

> No lay board of control was interposed between the ultimate authority of the state and the plenary powers of the professors. No elaborate administrative structure was required; no office of the president was established. The German universities were state institutions, but the combination of governmental restraint, limited professorial co-option, elected administrators and cultural isolation gave them the appearance, and a good deal of the reality, of self-governing academic bodies.

Metzger, *The German Contribution to the American Theory of Academic Freedom*, 41 AAUP Bull. 214, 217 (1955). *See also* Rockwell, *Academic Freedom—German Origin and American Development*, 36 AAUP Bull. 225 (1950).

When American scholars sought to transplant the German ideal, they confronted a very different legal structure. Despite early experiments with faculty control, American institutions swiftly came under the control of lay governing boards and presidents chosen by the lay boards. As Metzger puts it, "In the medieval university, inside confronted outside; in the American college, outside was ensconced within." *Academic Tenure* at 115.

Professors were subject to dismissal when they disagreed with the president, trustees, or influential donors, upon religious, economic, or political questions; the tacit assumption was that the institution had a right to demand instruction in the beliefs espoused by those who control it. *See generally* Hofstadter and Metzger *supra* Ch. IX, and L. Vesey, THE EMERGENCE OF THE AMERICAN UNIVERSITY 384-418 (1965). *See e.g.* Irons, *"Fighting Fair": Zechariah Chafee, Jr., the Department of Justice, and the "Trial at the Harvard Club,"* 94 Harv. L. Rev. 1205 (1981) (a recent review of the efforts of influential alumni of the Harvard Law School to secure Chafee's dismissal). The freedom generally sought by American academics was not a collective freedom of the institution from external control, but an individual scholar's freedom from the institution's legally constituted governing authority.

The American theory, crystalized in the seminal 1915 *General Report on Academic Freedom and Academic Tenure*, had to confront the stark fact that "outside was ensconced within." *See, generally*, Hofstadter & Metzger, *supra* at 407-412. The American theorists did so by attending first to the nature of the institution and second to the nature of the academic calling. An occasional institution was, by its charter, committed to the propagation of specific doctrine and was therefore reviewed as being morally (if not legally) "proprietary," in which case the theorists thought it appropriate only to impose a duty of candor to the public.[1] But in the vast majority

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[1] 1915 *Declaration* in ACADEMIC FREEDOM AND TENURE 155, 159 L. Joughin, ed. (1969):

> If a church or religious denomination establishes a college to be governed by a board of trustees, with the express understanding that the college will be used as an instrument of propaganda in the interests of the religious faith professed by the church or denomination creating it, the trustees have a right to demand that everything be subordinated to that end. If, again, as has happened in this country, a wealthy manufacturer establishes a special school in a university in order

of cases, institutions of higher education function for the common good, not for a narrow sectarian purpose; they exist to advance the sum of human knowledge. As a remonstrance later relied upon in Mr. Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957), aptly put it:

> In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—'to follow the agrument where it leads' . . . . The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.

THE OPEN UNIVERSITIES IN SOUTH AFRICA 10 (1957). It is essential that individual scholars at these institutions be free of control by institutional authority in performing their professional duty, save only that they be subject to a professional standard of care.

The distinction between morally "propriety" institutions, and institutions that are dedicated to academic

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to teach, among other things, the advantages of a protective tariff, or if, as is also the case, an institution has been endowed for the purpose of propagating the doctrines of socialism, the situation is analogous. All of these are essentially proprietary institutions, in the moral sense. They do not, at least as regards one particular subject, accept the principles of freedom of inquiry, of opinion, and of teaching; and their purpose is not to advance knowledge by the unrestricted research and unfettered discussion of impartial investigators, but rather to subsidize the promotion of the opinions held by the persons, usually not of the scholar's calling, who provide the funds for their maintenance. Concerning the desirability of the existence of such institutions, the committee does not desire to express any opinion. But it is manifestly important that they should not be permitted to sail under false colors. Genuine boldness and thoroughness of inquiry, and freedom of speech, are scarcely reconcilable with the prescribed inculcation of a particular opinion upon a controverted question.

freedom, was carried over in the 1940 *Statement*. "Institutions of higher education," it states, "are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition." 1940 *Statement* in AAUP POLICY DOCUMENTS AND REPORTS 1, 2 (1977 ed.) The 1940 *Statement* does provide that "Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment," reflecting the distinction dealt with in greater detail in the 1915 *Declaration*. The provision does not constitute an approval of limitations on academic freedom, but merely requires that they be made public. See *Interpretive Comment* No. 3 appended to the 1940 *Statement* in 1970 by the AAUP and the Association of American Colleges. AAUP POLICY DOCUMENTS AND REPORTS, *supra* at 3.

In sum, while the *immunity* of the individual scholar—to return to medieval origins—took on new meaning in the American setting, the *autonomy* of the corporate body, now under lay control, has been thought of as a necessary but distinctly ancillary support for the scholar's academic freedom. Fuchs, *Academic Freedom—Its Basic Philosophy, Function and History*, 28 Law & Contemp. Problems 431, 433 (1963); *cf.*, A PROGRAM FOR RENEWED PARTNERSHIP: The Report of the Sloan Commission on Government and Higher Education, 116 (1980). The critical difficulty with reliance upon a theory of corporate autonomy as an aspect of academic freedom *simpliciter* is found precisely in the shift in control of the corporate body from the professoriate to external authority. As Robert MacIver wrote of the 1950s, the attack on academic freedom had often been "aided and abetted, sometimes even led" by boards of trustees who should have invoked their institution's autonomy as a shield against such attack. R. MacIver, ACADEMIC FREEDOM IN OUR TIME, 271 (1955).

Thus, it becomes important to distinguish the concept of institutional autonomy, at issue in the instant case, from the concept of academic freedom as it has developed and been refined. Princeton University is not invoking its autonomy in defense of the freedom of its faculty to teach or do research in the face of some impermissible governmental intervention. Nor is it invoking its autonomy, as a derivative of the faculty's academic freedom, to insulate curricular choice or the selection of faculty from impermissible external constraint. *See* Section II(B), *infra*. The assertion rather is that a private institution of higher education is, under the head of "academic freedom," free "to indoctrinate students in a particular ideology or set of beliefs" Brief of Princeton University at 8.

It is Princeton's argument that a private institution of higher education has a right to be unfree: to be a place where faculty, students, and even casual visitors to the campus are required to be faithful to the established doctrines of the institution; to be a place where no voice may be heard on its property, even on its sidewalks, commons, or parking lots, speaking contrary to officially established truths; in fine, to be the kind of place the academic profession decried in the 1915 *Declaration*. It may well be that private institutions are at liberty to be agencies of dogma and doctrine. *See* Section II(A), *infra*. But institutional autonomy invoked for such a purpose—as a countermine to academic freedom—cannot rightly be claimed, as Princeton does, under the head of academic freedom.[2]

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[2] *Cf.* Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty* in THE CONCEPT OF ACADEMIC FREEDOM 59-60 (E. Pincoffs, ed. 1975):

> Gresham's law, that "bad money tends to drive out good money," applies equally to catchwords as it does to currency. Bad usages tend to drive out good usages and by much the same sort of process . . . . [T]he process begins with the inflation of rhetoric, and it ends with the debasement of meaning.

## II. NO IMPERMISSIBLE INVASION OF INSTITUTIONAL AUTONOMY WAS WORKED BY THE NEW JERSEY SUPREME COURT

### A. The Decision Below Did Not Interfere With Any Educational Policy or Program of Princeton University.

In a series of decisions over fifty years ago, this Court recognized that private educational institutions should be free of undue governmental interference in their educational affairs. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Farmington v. Tokushige*, 273 U.S. 284 (1927). These decisions rest upon a general right of parents to provide for the education of their children, as well as a more particular right of religious and ethnic groups to provide for instruction congenial to their beliefs and culture. In addition, drawing by analogy to the general protection of economic liberty under the Fourteenth Amendment, this Court recognized the institutions themselves as having an interest in their continuing ability to offer instruction; and the faculty members who offer instruction in them were also recognized as having a sufficient occupational interest to trigger constitutional scrutiny of the reasonableness of the challenged governmental action.

At root, these decisions are founded in a policy of tolerance, given the pluralistic character of American society. *Cf.* H. Friendly, THE DARTMOUTH COLLEGE CASE AND PUBLIC PRIVATE PENUMBRA 30 (1969), and *Ambach v. Norwick*, 441 U.S. 68, n. 6 at 76 (1979). That policy long antedates the adoption of the Fourteenth Amendment. In fact, much of the argument in the Dartmouth College case itself concerned the special status at common law of private eleemosynary corporations, and the educational implications of permitting a private university to be controlled by the state. *See* the argument of Jeremiah Mason before the New Hampshire Supreme Court, *The Trustees of Dartmouth College v. Woodward*, 65 N.H. 472, 502 (1891 reprinted ed.) ("If our semi-

naries of learning are to be reduced, to a state of servile dependence on the legislatures . . . to answer the occasional purposes of prevailing political parties, all hope of their future usefulness must be abandoned."), and of Daniel Webster before this Court, *The Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 598-599 (1819) ("It will be a dangerous, a most dangerous experiment to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinion . . . . Party and faction will be cherished in the places consecrated to piety and learning.") So too, Chief Justice Marshall's opinion reflects acute concern for the educational aspects of the case. *Id.* at 634, 646. To similar effect, in the first Girard College case, *Vidal v. Girard's Executors*, 2 Howard 127 (1844), this Court refused to void a deed of trust that *inter alia* prohibited any minister from holding office in the school or from even setting foot on the premises. The decision over that hotly debated provision "has been hailed as one of the first pronouncements of the American policy on nonsectarian schools." Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 Yale L.J. 979, 986 (1957).

But the state is not forbidden to regulate at all. What is prohibited is only such regulation that the Court has characterized as "arbitrary." In reality, given the policy underpinning this doctrine, what is prohibited are those restrictions that prevent the institution from carrying out its basic educational mission, *i.e.*, instruction in religion, in the German language, or in Japanese language and culture.

Nothing in the decision below works an impermissible invasion of Princeton's institutional autonomy under this limb of the theory. To be sure, Princeton has a valid administrative interest, recognized by the New Jersey Supreme Court, in maintaining order on the campus, and in assuring that there is no disruption of its educational activities. But what was offensive to the New

Jersey Constitution was not any regulation relevant to these ends, but simply a permit requirement that left access to the campus for peaceful political solicitation to hinge wholly upon standardless administrative discretion—in the absence of an invitation by some campus person or group. *Cf.* Van Alstyne, *Political Speakers at State Universitities: Some Constitutional Considerations*, 111 U. Pa. L. Rev. 328 (1963). The New Jersey Supreme Court was rather at pains to approve Princeton's current rules, which stringently regulate the time, place, and manner of solicitation for political purposes so to avoid any disruption of Princeton's educational activities. *State v. Schmid*, *supra* n. 2 at 617.

Nor can the state policy pursued be said to be arbitrary. Although this element of the case will doubtless be developed in the brief on behalf of Mr. Schmid, it ought simply be noted that Princeton is a residential community closely intertwined with the town itself. Accordingly, political parties have a strong interest in reaching the resident student body; and the students themselves have an interest in hearing a variety of views. See A. Levine, WHEN DREAMS AND HEROES DIED: A PORTRAIT OF TODAY'S COLLEGE STUDENT 34 (1980) ("The real impact of the student vote is being felt at the state and local level. Student enrollment exceeds the incumbent's margin of victory in 91 U.S. Congressional districts in 33 states . . . . According to college administrators, more political candidates than ever before are coming to campus to ask students for their votes.").

More important, nothing in the interpretation of the New Jersey Constitution below comes even remotely close to compelling Princeton to deviate from its educational mission. Indeed, at no time does Princeton suggest in what way its mission or educational program is altered as a result of the decision.[3] The only consequence oc-

[3] Princeton points out that the prior policy (as well as the current one) was approved by a Council representing administrators, faculty and students, presumably as evidence of a broad

casioned by the decision below is that in order to invoke an exemption from the free speech clause of the New Jersey Constitution an institution is required to announce what it is that it does profess that would be inconsistent with allowing a speaker to have access. This is of conceivable importance only to an institution that makes different professions to different constituencies; for example, that proclaims freedom without while practicing constraint within. But it is scarcely an impermissible infringement to ask an institution to reveal its doctrinal commitments if it seeks an exemption recognized by law. *See e.g.* 29 U.S.C. § 501(c)(3) (1977) discussed in Section III *infra*. Even the draftsmen of the 1915 *Declaration*, in refusing to hold that morally proprietary institutions should not exist, saw nothing amiss in requiring them to be candid about their ideological commitments.

What Princeton asserts are the rights of some other, hypothetical and very different kind of institution. An institution that cherishes academic freedom does not vouch for the truth or wisdom of every utterance of its faculty, let alone every utterance on its property. Inherent in the process of sifting and winnowing ideas, much that is false—even nonsensical—is necessarily assayed. *See* Kirkland, *Academic Freedom and the*

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consensus of the college community as a whole on the need for those rules. Brief of Princeton University, n. 17 at 14. The American Council on Education argues even more strongly that such a consensus "reached through a lively and wide ranging internal debate" should be deferred to. Brief of *amicus* ACE at 13.

Of course, faculty action on educational matters is of considerable significance, inasmuch as the faculty should be primarily responsible for the conduct of the institution's educational mission. *See Kunda v. Muhlenberg College*, 621 F.2d 532 (3rd Cir. 1980). But there is no evidence in the record of the nature of the faculty's awareness of the issues presented in the approval of those rules, of its degree of concurrence in them, or whether the Council as a whole merely acted *pro forma* to endorse what was thought of as purely a matter of administrative housekeeping.

*Community* in FREEDOM AND THE UNIVERSITY 115 (1950). Unlike a shopping center, which is merely "unlikely" to be identified with the ideas expressed by pamphleteers on its property, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), adherence to academic freedom acts as a profession of institutional neutrality. Metzger, *Academic Freedom in Delocalized Institutions*, in DIMENSIONS OF ACADEMIC FREEDOM 1, 5 (1969) ("By no stretch of analogy was the modern university to be considered a missionary society, a propaganda agency, an arm of a political party: it was a residence, a hothouse, a sanctuary—the figures were adoring, but they left the university with nothing of substance to proclaim.")

Accordingly, what Princeton posits are the rights of some other institution; one that *is* a missionary society or an agency of propaganda. The decision below, Princeton argues, would impermissibly curtail such an institution's right to measure every utterance on its property against its own doctrinal yardstick. In the absence of a real case, however, it suffices to say that the New Jersey Supreme Court seems conscientiously to have accounted for just such a situation in the criteria it adopted. The court held that the right of access hinged *inter alia* upon the "nature, purposes, and primary use" of the property and the "purpose of the expressional activity" in relation to the private purpose. *State v. Schmid*, *supra* at 630. Thus the Court inquired of whether the expressional activity was "discordant *in any sense* with both the private and public uses" of the campus; more particularly, whether the expression was "incompatible with . . . Princeton University's professed educational goal . . ." *Id.* at 631 (emphasis added). It seems rather clear that the Court was at pains to exempt from the reach of the New Jersey Constitution expressive activity which *is* discordant with the private purpose or with some professed educational goal that would be infringed by the particular expression.

To the same end, Princeton argues that education—in the broadest conceivable sense—occurs outside the classroom "on the walkways and grounds of the campus" in exchanges between and among students and faculty. Brief of Princeton University at 13. In other words, the ambiance of a campus may contribute to an "atmosphere" conducive to the institution's particular educational goals. *Id.* An institution may, for example, wish to maintain a predominantly pastoral setting, restricting the tumult of political activity to specially reserved areas—just as Princeton has; or, it may wish to be virtually a monastic community, excluding all political activity from the campus in order to wall itself off from the world. But nothing in the decision below upsets this prerogative. It seems quite clear that the first and second prongs of the test adopted below—the nature of the private purpose of the property and the extent and nature of the public's invitation to use the property—account for each of these cases. A political solicitor in the first case would be restricted to the areas established by the institution, and, in the second, would be excluded altogether. Thus the balancing mandated by the New Jersey Supreme Court appears to be no less sensitive to this claim than to an ideological one.

It is here that Princeton makes its most arresting argument: the decision of what uses are compatible with the purposes to which the institution is dedicated cannot be for a court to make. In essence, Princeton argues that the very process of examining the content of the institution's educational policy is impermissibly intrusive of institutional autonomy. This argument will be dealt with separately in Section III, *infra*.

### B. The Decision Below Did Not Invade Institutional Autonomy As a Buttress for Academic Freedom.

With the advent of the governmental loyalty-security programs of the 1950s, this Court confronted the constitutional status of the individual faculty member's claim of academic freedom as against external, govern-

mental interference. This Court recognized academic freedom as a subset of the First Amendment in these circumstances. *Weiman v. Updegraff*, 344 U.S. 183 (1952); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Baggett v. Bullitt*, 377 U.S. 360 (1964); and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). Largely unaddressed in these decisions was the relationship of the individual teacher or scholar's academic freedom to the liberty of the institution, recognized three decades earlier in *Meyer*, *Pierce* and *Tokushige*.

The connection between the two was drawn, however, in Mr. Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, *supra* at 255. Mr. Justice Frankfurter stressed the value of academic freedom, which requires "the exclusion of governmental intervention in the intellectual life of a university," *Id.* at 262. He adverted specifically to a then recent South African remonstrance:

> "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

*Id.* at 263. *See also* Bok, *The Federal Government and the University*, 58 The Public Interest 80, 81-82 (1980).

Accordingly, when the state intrudes into these areas of a university's intellectual life, it erodes a necessary buttress for the protection of academic freedom.[4] In this

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[4] Mr. Justice Powell took this view in his opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-315 (1978). However, the South African remonstrance, quoted by Mr. Justice Frankfurter, merely harkens back to the medieval idea of the *studium generale* where students from all parts of the Western world were welcome. THE OPEN UNIVERSITIES IN SOUTH AFRICA 14 (1957). It did not concern the rather different problem of a

sense, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), is on point. A university that cherishes academic freedom—public or private—commits its classrooms to the pursuit of truth. As this Court said in *Keyishian v. Board of Regents*, *supra* at 603:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Just as the State may not commandeer a publisher's printing press, so may it not commandeer an institution's classrooms to impose a pedagogical orthodoxy.[5]

But *Tornillo* does not support Princeton's position here. The State of New Jersey has not commandeered Princeton's classrooms. It has merely refused to apply its Law of Trespass to enforce Princeton's former rules governing access to public areas of the campus, areas that were otherwise fully amenable to stranger political solicitation either by invitation of any student group or upon administrative permit. It is important to repeat, as Robert MacIver earlier observed of speaker bans, "The campus is neither a schoolroom nor a barracks." R. MacIver, ACADEMIC FREEDOM IN OUR TIME 212 (1955). Princeton elides a crucial distinction between

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constitutional constraint upon a system of racially *preferential* admissions. Accordingly, *amicus* AAUP's own Brief in support of the University in *Regents of the University of California v. Bakke*, *supra*, while stressing the educational value of student diversity, declined to assimilate a program of preferential admissions as an aspect of academic freedom.

[5] Moreover, the freedom of the press guaranteed by the First Amendment is the publisher's freedom—he owns the printing press. Academic freedom, in the authentic sense, is the teacher's or scholar's freedom, not the "owner" of the classroom. *See* Section I, *supra*. To just the same effect, *Tornillo* does speak of an impermissible intrusion on the function of editors. But there has been no intrusion here on the function of the faculty.

its functional autonomy as an educational institution, and its territorial autonomy, as a proprietor of private property. The New Jersey Supreme Court has not construed the free speech clause of that state's constitution to require Princeton to install Mr. Schmid as a member of the faculty, to purchase or store Schmid's pamphlets in its library, to inscribe his works on its reading lists, or to treat his ideas in any way in any institutional offering. But these are the kinds of functions that define Princeton as an educational institution in contradistinction to a shopping center. A university makes a truly different kind of claim to autonomy—a functional rather than a territorial claim—when it advances its right to control the access of persons to its rosters and ideas to its syllabi. These are the kinds of freedoms Mr. Justice Frankfurter adverted to in *Sweezy*; but nothing in the decision below works any interference with them.

To be sure, there may be institutions so doctrinally regimented as to treat the campus as the functional equivalent of a barracks, so to channel every expression on campus through an ideological filter. There may, *arguendo*, even be an institution somewhere that treats the campus as a schoolroom though *amicus* is aware of none; that is, where every expression on campus is regulated not for ideological purity but somehow for pedagogical value. In either event, the New Jersey Supreme Court seems rather at pains to stress that private or educational purposes could defeat a claim of access. *See* Section II(A) *supra*. But Princeton has not asserted that either is the case here. Instead, Princeton asserts that being required to show what educational goals are being impaired is an independent infringement of Princeton's autonomy. That argument is dealt with in Section III, *infra*.

## III. THE JUDICIAL PROCESS DOES NOT IMPERMISSIBLY INVADE INSTITUTIONAL AUTONOMY IN DETERMINING WHETHER A PARTICULAR POLITICAL SOLICITOR'S ACCESS TO A CAMPUS WOULD BE INCONSISTENT WITH THE INSTITUTION'S EDUCATIONAL OBJECTIVES

Princeton rightly points out that the test adopted by the New Jersey Supreme Court requires a court to determine whether the particular expression is inconsistent with the institution's educational purposes. In order so to do, the court must first ascertain what the institution's professed educational purposes are. Accordingly, Princeton objects to that inquiry on four grounds: (1) judicial deference, in the event the content of the utterance is discordant with religious or ideological doctrine, would constitute state action limiting speech upon non-neutral grounds, which the state is constitutionally forbidden to do; (2) the test adopted below impermissibly substitutes a judicial for an institutional determination of what the institution's educational goals are; (3) the standard adopted is unconstitutionally vague; and, (4) the very process of being required to explain how its educational purposes would be defeated by allowing access is an independent infringement of institutional autonomy. None of these grounds is tenable.

It is part of the organic law of the State of New Jersey that, "every person may freely speak, write and publish sentiments on all subjects . . ." and that no law shall abridge that liberty. N.J. Const. (1947), Art. I, para. 6. The state's highest court has construed that policy as encompassing an expressive easement upon the public areas of certain private properties. However, the state has declined to extend that easement where it would defeat the religious, ideological or educational purposes or uses of the property. Nothing in the federal constitution forbids the state so to defer, even if the state could not adopt a religious or ideological test for access to its own educational institutions. If such a declination is unconstitutional then the constitution will

have consumed itself: any deference to pluralism would, by that logic, be impermissible. But the declination to extend a state compulsory school attendance law where enforcement would conflict with religious belief does not amount to establishment of religion. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972). Nor does deference to religious belief for the purposes of conscription. *United States v. Seeger*, 380 U.S. 163 (1965). Whatever the reach of *Shelley v. Kraemer*, 334 U.S. 1 (1948)—which, though not cited in the brief, surely supplies the doctrinal foundation for Princeton's argument—it should not be extended to the point of a virtual *reductio ad absurdum*.

By the same token, the function of the inquiry is not to substitute a judicial for an institutional judgment of educational purposes and goals, but to ascertain what those purposes and goals are as a necessary predicate for determining whether deference is due. So, too, in *Wisconsin v. Yoder, supra*, this Court was called upon "to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent." *Id.* at 215. Noting that "a determination of what is a 'religious' belief or practice . . . may present a most delicate question," *id.*, the Court nevertheless was compelled to proceed to that determination. If inquiry into the content and authenticity of religious belief does not violate a constitutional prohibition upon free exercise of religion, neither does the constitution forbid inquiry into the content of institutional policy in order to defer to religious, ideological or educational objections to particular speaker access.[6]

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[6] In the one case that does touch upon this issue, *Berea College v. Kentucky*, 211 U.S. 45 (1908), this Court simply ignored the College's own profession of what its educational mission was. The state had enacted a law forbidding the instruction of whites and blacks mingled together. This Court's majority took the law to be an amendment to the charter of Berea College, which amendment, the Court observed, would be impermissible if it defeated or substantially impaired the object of the charter. *Id.* at 57. No such

Neither are the standards adopted below unconstitutionally vague. As Mr. Justice Frankfurter pointed out in his concurrence in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 507 (1952), words that "gain 'precision from the sense and experience of men'" are not impermissibly vague. *Id.* at 519 (citing *Mutual Film Corp. v. Ohio Industrial Comm'n*, 236 U.S. 230, 245-246 (1915), referring *inter alia* to the term "educational" as such a word). (The Internal Revenue Code, for example, exempts from federal income taxation corporations that are conducted for "religious, charitable . . . or educational purposes," 26 U.S.C. § 501(c)(3) (1977), necessarily requiring a governmental determination of whether a particular institution is authentically so conducted.) The institution, if it wishes to exclude the speaker, need only articulate what religious, ideological or educational purpose is offended by allowing access. In other words, the standard adopted below gains precision from the institution's own "sense and experience."

To be sure, being called upon by some external agency to provide an explanation can be an impermissible invasion of institutional autonomy. But even in the area of the selection of faculty, one of the "four essential freedoms" inextricably tied to academic freedom, not *every* inquiry by the state constitutes an impermissible inva-

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impairment was found, the Court concluded, for instruction to both races could still be imparted—only separately. (Mr. Justice Harlan dissented, largely on the impermissibility of a racial distinction drawn by state law.)

As Berea College had long made abundantly clear, it viewed racial integration (and co-education) as integral, indeed critical to its mission. BEREA COLLEGE, KENTUCKY: AN INTERESTING HISTORY (1883). These innovations were, to put it mildly, highly controversial in that part of the country at that time. *Id.* Thus the Court simply disregarded the College's plainly professed educational goals. Under the decision below, however, the purpose of the inquiry is not to determine whether the policy of the state should override the institution's educational mission—which is what the Court determined in *Berea College*—but precisely to defer to the educational mission.

sion. The permissibility of external inquiry turns upon the purpose of the inquiry—its compatibility with the academic enterprise—the availability of procedural safeguards for the institution, and the likely impact of the inquiry upon academic freedom and the conduct of educational affairs.

On the one hand, the legislative security investigations of the 1950s were designed essentially to cast public obloquy upon academics whose past associations or political beliefs were then deemed suspect. *See generally* R. MacIver, ACADEMIC FREEDOM IN OUR TIME Ch. XI (1955), and A. Morris, *The University of Washington Loyalty Oath Case*, 50 AAUP Bull. 221 (1964) (and the extensive sources noted therein). *See also* J. Sanders, COLD WAR ON CAMPUS: ACADEMIC FREEDOM AT THE UNIVERSITY OF WASHINGTON, 1946-64 (1979) (for a more recent case study). Although this Court later came to decry any governmental effort to "cast a pall of orthodoxy over the classroom" in dealing with disclaimer affidavits, the Court took a narrower view of legislative investigation. Examination of the contents of a particular lecture was held to be impermissible in *Sweezy v. New Hampshire, supra*; but, inquiry into a former graduate student's affiliations was not. *Barenblatt v. United States, supra.* In the latter case, AAUP as *amicus curiae* explicitly argued that the process of investigation was an impermissible invasion of institutional autonomy; that the procedure was an *in terrorem* device to chill the free play of ideas and to restrain the hiring and retention of politically controversial faculty.[7] Subsequent

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[7] Brief *amicus curiae* of the American Association of University Professors in *Barenblatt v. United States, supra*:

> One of the essential preconditions of academic freedom—of freedom in teaching and research—is unhampered control by the university over employment and dismissal of its faculty.
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> * * * *
>
> Once this key is surrendered to an external body, be it public or private, the university becomes an adjunct and dependency

study has indicated that these ends were largely achieved. P. Lazarfield and W. Thielens, THE ACADEMIC MIND Ch. 2 (1958). As the former President of the University of Illinois recently observed, "Certainly the ebullience of colleges and universities during the early postwar years was modified by the realities of the fifties." D. Henry, CHALLENGES PAST, CHALLENGES PRESENT: AN ANALYSIS OF AMERICAN HIGHER EDUCATION SINCE 1950, 96 (1975). In that case, the purpose and effect of the process of inquiry were bluntly antithetical to academic freedom, and the procedural safeguards for error or abuse during the investigative process were, to say the least, minimal.

But on the other hand, the states have traditionally reserved the power to regulate institutional degree-granting authority in order to prevent fraud upon the public. *See* L. Barrett, STATE CONTROL OF PRIVATE INCORPORATED INSTITUTIONS OF HIGHER EDUCATION Ch. II (1926), and E. Freund, THE POLICE POWER §§ 266-267, 479 (1904). New Jersey has done so since 1912. See *Shelton College v. State Board of Education*, 48 N.J. 501, 226 A. 2d 612 (1967). (New Jersey's law was supported by Woodrow Wilson as President of Princeton, and later signed by him as Governor. *Id.* at 619.) It has never been suggested that such a requirement, necessarily involving state scrutiny of the quality of faculty and educational programs, was *per se* an impermissible invasion of an institution's autonomy. *Pierce v. Society of Sisters*, *supra* at 534. *Compare Shelton College v. State Board of Education*, *supra* with *New Jersey—Philadelphia Presbytery of the Bible Presbyterian Church [Shelton College] v. New Jersey Board of Higher Edu-*

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of that body, and loses its *raison d'être* as an arbor for the cultivation of new ideas. Once this key is surrendered, academic freedom disappears. Direction of curriculum and instruction, honesty in speech and publication—all that stands in need of academic freedom and justifies it—rest upon the principle of autonomy. Brief at 8-9.

*cation*, 482 F. Supp. 968 (D.N.J. 1980), *aff'd.* F.2d (1981). The standards applied reflect minimal academic requirements. *See e.g. Regulations and Standards For Program Approval and Licensing of Higher Education in the State of New Jersey* (1975). The process of inspection is geared toward that end, and judicial process is available to correct error, abuse, or a violation of First Amendment rights.

To be sure, there are less easily cabined situations. Title VII of the Civil Rights Act of 1964, as amended, forbids employers, including institutions of higher education, from discriminating in employment on certain proscribed grounds. 42 U.S.C. § 2000-e 17 (1977). The purpose of the intrusion is not inconsistent with generally recognized academic standards, for a discriminatory renewal decision is plainly not one made on academic grounds; but the very process of civil litigation, especially the effect of unrestrained pre-trial discovery, has been thought to chill the collegial character of reappointment and tenure decisions. Accordingly, the AAUP has proposed that a qualified testimonial privilege should be recognized for faculty participants to the reappointment process. *A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*, 67 Academe 27 (1981). In other words, the process of litigation can be "fine tuned," consistent with the Federal Rules of Civil Procedure, to achieve the statutory objective, while according a proper measure of institutional autonomy. *See Report of Committee A 1980-1981*, 67 Academe 176 (1981) (Part V "On Judicially Compelled Disclosure"). *Cf. EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), cert. den. —— U.S. —— (1981) (declining to exempt religious institutions from the reach of Title VII, but disallowing inquiry into the *bona fides* of a religious test for employment, and stressing the availability of a full trial as a protection for the institution).

The role of Title VII illustrates the basic infirmity in Princeton's argument. In the instant case, the purpose of the inquiry is not to impose an external judgment of what the institution's educational objective should be, but merely to ascertain what those objectives *are* in order expressly to defer to the institution should political speech be discordant with them. In fact, the New Jersey Supreme Court was at pains to stress the principle of institutional autonomy:

> [W]e must give substantial deference to the importance of institutional integrity and independence . . . . The singular need to achieve essential educational goals and regulate activities that impact upon these efforts has been acknowledged even with respect to public educational institutions. . . . Hence, private colleges and universities must be accorded a generous measure of autonomy and self-governance if they are to fulfill their paramount role as vehicles of education and enlightenment.

*State v. Schmid*, *supra* at 632 (citations omitted). In sum, the purpose of the inquiry is scarcely inconsistent with educational objectives, the manner in which inquiry is made, affording full due process, is fully protective of the institution, and the impact is entirely consistent with academic freedom.

If judicial inquiry for such a purpose is an impermissible breach of institutional autonomy, it should follow that judicial inquiry into the selection, retention and promotion of faculty under Title VII—drawing upon the much closer relationship of that activity to academic freedom—in which an institution's reasons for denying reappointment might well be rejected as unfounded or pretextual, is *a fortiori* an impermissible invasion of institutional autonomy. "Yet even a die-hard opponent of federal regulation will concede," writes President Bok, "that the courts should prevent universities from discriminating against professors because they are black . . . . The problem is where to draw the line. How much autonomy should universities have in carrying out their

academic functions?" Bok, *The Federal Government and the University*, 58 The Public Interest 80, 82 (1980).[8] To the same effect, if the inquiry implicated here is a violation of institutional autonomy, so *a fortiori* would be an inquiry for the purposes of determining whether educational quality warrants approval of degree-granting authority. In that case, the state is not merely ascertaining what the institution's policies are, but is free to deny degree-granting authority upon an assessment of the educational program. Yet few would argue that the state should be helpless to protect the public from degree mills. *See generally* R. Reid, AMERICAN DEGREE MILLS (1959).

Indeed, the logic of Princeton's position would exempt the courts from jurisdiction even to adjudicate breach of contract claims by faculty. Invariably, these claims turn upon the meaning of institutional rules and professional usage. *See generally*, Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 Iowa L. Rev. at 1124-1159 (1980). The precise content of academic "tenure," for example, is not abundantly clear when the operative institutional document does little more than adopt that phrase. *Id. See e.g. Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978) and *Drans v. Providence College*, 383 A. 2d 1033 (R.I. 1978). The constitutional infirmity alleged here is that the decision below impermissibly admits of *any* judicial scrutiny of an institution's educational policies in order to ascertain whether allowing access would be inconsistent with those policies: "those rules are geared to Princeton's educational policy, and it is constitutionally wrong for state officials to determine what that policy is or what

[8] In fact, it is uncertain whether the decision of the New Jersey Supreme Court is actually one regulating the university's "academic functions" at all; that is, in the absence of an educational justification by the university for a rule that conditions political solicitation upon a standardless permit requirement, it remains to be seen whether the rule is one that has an educational justification. *See* Section II(A), *supra*.

activities are consonant with it." Brief of Princeton University at 18-19. In the contract case as well, the court is compelled to determine what the standards are that the institution has adopted so as to decide whether the institution has abided by them. *See, e.g., AAUP (Bloomfield College Chapter) v. Bloomfield College*, 322 A.2d 846 (N.J. Super. 1974) *aff'd.*, 346 A.2d 615 (App. Div. 1975). If the infirmity in the instant case lies in the very process of scrutiny and explanation, so *a fortiori* must the same process be infirm in a contract case: the issue at stake affects the institution's freedom to select and retain faculty—one of the "four essential freedoms" adverted to earlier; and, unlike the instant case, the court properly is free to reject the institution's construction of its own policies. *Id.* Indeed one court refused to construe an institution's rules against the institution precisely on grounds of institutional autonomy. *Greene v. Howard University*, 271 F. Supp. 609, 615 (D.D.C. 1967). But that case was reversed in what has become the leading decision on the contract rights of private university faculty. *Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969) (per McGowan, J.). *See* Finkin, *Regulation by Agreement: The Case of Private Higher Education*, *supra* at 1124-1159. Were Princeton's argument to be accepted, however, an institution that embraced academic freedom as part of its rules would nevertheless be free to dismiss an outspoken or politically controversial faculty member without there being any recourse to the state courts. The institution could assert, in the very terms Princeton argues here, that its "rules [providing for academic freedom and tenure] are geared to its educational policy, and it is constitutionally wrong for state officials to determine what that policy is or what activities are consistent with it." [9]

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[9] This is the basic infirmity in identifying institutional autonomy *simpliciter* with academic freedom. *See* Section I, *supra*. *See also* Finkin, *Some Thoughts on the Powell Opinion in Bakke*, 65 Academe 192, 196 (1979) pointing to the implications of that identification:

In sum, the purpose and procedure of the inquiry does no real violence to institutional autonomy. Neither is there any serious assertion that the impact will be deleterious.[10]

To be sure, America's colleges and universities find themselves, as never before in the Nation's history, enmeshed in the web of the administrative state. It is only natural, indeed desirable, that they should look to the Constitution as a shield when their vital need for educational autonomy is threatened. The problem, however, lies in distinguishing the permissible from the impermissible for constitutional purposes. *Compare* Oaks, *A Private University Looks at Government Regulation*, 4 J. College and Univ. Law 1 (1976) with O'Neil, *God*

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Inasmuch as no nexus between the exercise of academic freedom and the claim of autonomy need be shown, the interests insulated are not necessarily those of teachers and researchers but of the administration and the governing board; the effect is to insulate managerial decision-making from close scrutiny, even in cases where the rights or interests of the faculty might be adverse to the institution's administration.

[10] In terms of harmful consequences, Princeton had argued in its Jurisdictional Statement that rather than subject themselves to judicial examination of their educational philosophies, New Jersey's private colleges will simply exclude the public altogether from their campuses. *Id.* at 12. In other words, in lieu merely of explaining what ideological or educational objectives are threatened by permitting a political speaker to have access to the campus, an institution would rather wall itself off entirely from the community of which it had heretofore been an integral part. *Amicus* AAUP, respectfully, cannot conceive of the decision below having such an effect. It suffices to say that that argument is not reiterated in Princeton's Brief and has, apparently, been abandoned.

*Amicus* ACE argues, however, that the impact of the decision below will dampen educational innovation. (Brief of ACE at 14-18.) *Amicus* AAUP believes that this position is plainly insupportable. In terms of the major movements of educational experimentation, the public sector—which is constrained by the First Amendment for the purposes of speaker access—has been no less effervescent than the private sector. *See generally*, D. Grant and D. Riesman, THE PERPETUAL DREAM: REFORM AND EXPERIMENT IN THE AMERICAN COLLEGE (1978).

*and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 U. Cincinnati L. Rev. 525, 545 (1975). The difficulty with the position advanced here is that it elevates an institution's purely administrative interests—divorced from the need to protect academic freedom, and divorced from any demonstrable relationship to educational affairs—into a special category of First Amendment rights. There is no justification for a constitutional doctrine so indiscriminate in its sweep and pernicious in effect.

## CONCLUSION

*Amicus* AAUP is generally in accord with Princeton University on the need for institutional autonomy in educational affairs and on the constitutional protection that may properly be claimed in support of institutional autonomy. Nor is *amicus* AAUP unsympathetic to the depth of sentiment that has persuaded the administration of one of the Nation's outstanding universities to press the theory of autonomy in the instant case. But upon the precise question presented, and for the reasons expressed in this brief, *amicus curiae* respectfully urges that the judgment of the New Jersey Supreme Court be affirmed.

Respectfully submitted,

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